STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 9, 2011
v	No. 298148 Wayne Circuit Court
PERRY O'NEAL CARTER, Defendant-Appellant.	LC No. 09-018245-FC

Before: CAVANAGH, P.J., and WILDER and OWENS, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree murder, MCL 750.316(1)(b) (felony murder), carjacking, MCL 750.529a, assault with intent to rob while armed, MCL 750.89, and possessing a firearm during the commission of a felony ("felony-firearm"), MCL 750.227b. Defendant was sentenced, as a third habitual offender, MCL 769.11, to life imprisonment for the felony murder conviction, 30 to 45 years' imprisonment for the carjacking conviction, 20 to 30 years' imprisonment for the assault conviction, and two years' imprisonment for the felony-firearm conviction. We affirm.

I. SUFFICIENCY OF THE EVIDENCE

Defendant claims that there was insufficient evidence to support his convictions related to two separate events that occurred on the night of June 13, 2009. Specifically, defendant maintains that there was insufficient identification evidence to prove that he was the person who committed the charged crimes. We disagree.

A challenge to the sufficiency of the evidence is reviewed de novo and in a light most favorable to the prosecution to determine "whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). "All conflicts with regard to the evidence must be resolved in favor of the prosecution. Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of the crime." *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005) (internal citations omitted).

A. ASSAULT WITH INTENT TO ROB WHILE ARMED

At around 10:00 p.m. on June 13, 2009, Robin Veronica Winston and her boyfriend, Richard Marshall, drove to the Detroit Liquor Store, located at 11414 Livernois in the city of Detroit. Winston waited inside her minivan, while Marshall walked into the store. As Marshall entered the store, two black males exited, one of which had a much lighter complexion than the other male. The two males walked away from the store, but at some point, turned around and ran towards Winston in her car. The lighter-skinned male was wielding a small handgun and had it pointed inches away from Winston's head. Winston screamed and quickly put the car in reverse. After backing up, the two men ran away across Livernois to the west.

There was sufficient evidence to allow a jury to find beyond a reasonable doubt that defendant committed this crime. First, Winston positively identified defendant at trial as the person who wielded the gun and assaulted her.[1] Second, the liquor store's video tape showed the armed man wearing pants that had distinctive stripes on the lower legs. When defendant was arrested later that night, he was wearing brown jogging pants with stripes on the lower legs. Thus, a jury could have reasonably concluded that defendant was the person who assaulted Winston.

B. FELONY MURDER AND CARJACKING

Shortly after the two men ran away, Winston drove to Detroit's Tenth Precinct, which was located just a few blocks away on Livernois, where she reported the attempted carjacking to Officer Melvin Williams. As Winston was talking with Williams, Anthony Horton walked into the precinct, announced that he had been shot, and collapsed.

Horton expressed that he was shot and his wife's car was taken from him. Before dying, Horton described that he was robbed by two black men, with one being shorter and having a much lighter complexion than the other man. Winston immediately recognized the descriptions as matching the men who just attempted to rob her.

Sergeant Benjamin Wagner called Horton's wife and obtained the description of her car, a four-door, silver 2003 Chrysler Sebring, along with its license plate number. Shortly thereafter, the police encountered the reported Sebring. Defendant was driving the vehicle and attempted to evade the police. While driving, defendant admitted to the passengers that he "did some hot stuff in this car" and "I ain't going to jail." After driving a few blocks, defendant jumped out of the still-rolling vehicle and ran away. Officer Jesse Wilson gave chase but was unable to apprehend defendant. Wilson noted, however, that the driver was wearing brown pants that had striping at the bottom. Shortly thereafter, another police officer located defendant and arrested him. Defendant was wearing a black tank top with brown sweat or jogging pants that had three stripes towards the bottom, which matched the appearance on the Detroit Liquor Store video.

[1] Additionally, evidence was introduced that Winston also identified defendant out of a lineup a couple weeks after this event and identified him again at the preliminary examination.

Then, after defendant was administered his *Miranda*[2] rights, he decided to show police where the handgun was located. As a result, defendant led them to a nearby house, where Keron Robinson[3] lived. Police recovered a .32-caliber handgun hidden in Robinson's bedroom. Subsequent testing confirmed that the bullet retrieved from Horton was shot from this handgun.

As a result, there was sufficient evidence to prove that defendant murdered Horton during the commission of a larceny. First, the jury reasonably could infer that defendant's flight from the police was evidence of a consciousness of guilt. Second, defendant was the person who led police to the murder weapon at Robinson's house. Third, Horton said that the light-skinned one of the two assailants was the one to pull the trigger, and defendant did have a much lighter complexion than Robinson. Fourth, defendant was driving Horton's Sebring just minutes after the shooting. Thus, when viewed in a light most favorable to the prosecution, the jury reasonably could have inferred that defendant was the person who shot Horton.

Likewise, with respect to the carjacking crime, in addition to the above evidence, defendant made the following admission. While in a holding cell after his arrest, defendant admitted that he "hit a lick" and took a car from "a crack head." It is important to note that in Horton's autopsy results, it was established that Horton had cocaine in his system. Thus, this was further evidence that defendant carjacked Horton. As a result, there was sufficient evidence to establish that defendant was the person who committed these crimes, and this claim fails.

II. JURY INSTRUCTION

Defendant next argues that the trial court erred when it gave a clarifying instruction in response to a note from the jury. But "[a] party must object or request a given jury instruction to preserve the error for review." *People v Sabin (On Second Remand)*, 242 Mich App 656, 657; 620 NW2d 19 (2000). Not only did defendant fail to object to the clarified jury instructions, defendant waived the issue by expressly approving the response. *People v Chapo*, 283 Mich App 360, 372-373; 770 NW2d 68 (2009).

Waiver of an issue will extinguish any error. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Waiver has been defined as the "intentional relinquishment or abandonment of a known right." *Id.* (internal quotations and citations omitted). The doctrine of waiver is presumed to be applicable in both constitutional and statutory provisions. *Id.* at 217-218.

Here, after the jurors initially were instructed on the law and started their deliberations, the jury submitted a question to the trial court, "Can second degree murder be made as a separate account and also charged with carjacking, armed robbery, felony firearms?" The trial court was not entirely clear on what the jury was asking. The trial court sought advice from both attorneys on how to respond.

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[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[3] Robinson was a codefendant but pleaded guilty before the start of trial to second-degree murder, MCL 750.317, and assault with intent to rob while armed, MCL 750.89.

THE COURT: Do we want to bring them out and ask them? I don't know how we ask them in writing – that's my problem, and I don't really want to put the Foreperson on the spot.

[The Prosecutor]: All right. Then why doesn't the Court simply re-read the instruction and see if that helps.

THE COURT: And maybe ask them if that doesn't do it then they can ask for a more specific –

[The Prosecutor]: Right; re-note, sure. That should fly. That should fly.

[Defense Counsel]: Agreed.

The trial court then decided to slightly modify the instruction that it had given earlier, hoping that it would clarify the situation for the jury. After reading the proposed, modified instruction, the trial court explained it also would reissue the instruction detailing that the four crimes defendant was being charged with were to be decided independently.[4] Both the prosecutor and defense counsel replied, "Okay."

Because defense counsel expressed satisfaction with the trial court's answer to the jury's question, any issues related to this response was waived, and any error is extinguished.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kurtis T. Wilder
/s/ Donald S. Owens

[4] Defense counsel earlier had suggested that this instruction, which states that the jury could find defendant guilty of all, some, or none of the crimes would be a "good one to [re-]read."